UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

STACY EVANS, in her individual capacity and as representative on behalf of all other similarly situated individuals,	)	
Plaintiff	)	
v.	)	
COMMISSIONER, MAINE DEPARTMENT OF HUMAN SERVICES,	)	*Civil No. 89-0058 P*
Defendant and Third-Party Plaintiff)	)	
v.	)	
LOUIS W. SULLIVAN, M.D., Secretary of Health and Human Services,	)	
Third-Party Defendant	)	

RECOMMENDED DECISION ON THE PLAINTIFF'S CLAIMS FOR RETROACTIVE RELIEF

In its Order Affirming in Part the Recommended Decision of the Magistrate on the plaintiff's motion for summary judgment and on the third-party defendant's motion to dismiss or in the alternative for summary judgment,[1] the court (Carter, C.J.) granted the plaintiff's motion for summary judgment, denied the third-party defendant's motion for summary judgment and granted summary

[1] This action concerns the policy of the Commissioner of the Maine Department of Human Services, who is responsible for implementing and administering the federal AFDC program in Maine, as to the applicability of the so-called ``30 and 1/3 disregard'' in considering the continued eligibility for benefits of an AFDC recipient under 42 U.S.C. ' 602(a)(8) and the federal regulations promulgated pursuant thereto.

judgment *sua sponte* in favor of the defendant Commissioner of the Maine Department of Human Services (``Commissioner") as to that part of his third-party claim against the third-party defendant, who is the Secretary of Health and Human Services (``Secretary"), which seeks injunctive relief against the Secretary's enforcement of AFDC policy in a manner inconsistent with the court's judgment. The court remanded this case for consideration of issues (raised for the first time in the Commissioner's Objections to Magistrate's Recommended Decision) concerning the scope of the relief to be granted the plaintiff and members of the certified class.[2]

In the complaint, the plaintiff sought, *inter alia*, an order requiring the Commissioner ``to recompute the AFDC benefits of all current class members and to correct any underpayments of benefits." Complaint, Request for Relief & e. The plaintiff also requested an order requiring the Commissioner ``to provide notice to all other class members of their right to apply for and receive a correction of any underpayment of AFDC benefits caused by [the Commissioner's] unlawful policies . . . ." *Id.* & f.

The Commissioner argues that neither plaintiff Evans nor the class members are entitled to retroactive relief. Specifically, he urges that Evans is entitled to relief covering only the period preserved by her administrative appeal and that, in fact, she has received the full benefit of the disregard during that period. Citing the decision of the Maine Supreme Judicial Court in *Thiboutot v.*

[2] The class consists of persons residing in the State of Maine after April 1, 1987 who, within four months of having received AFDC benefits, had an individual with earned income added to the assistance unit and who have not had the ``30 and 1/3 disregard" income deduction used in determining whether a certain 100% test is met. Plaintiff herself had been receiving AFDC benefits prior to the addition of her husband to her assistance unit.

Maine, 405 A.2d 230 (Me. 1979), *aff'd on other grounds*, 448 U.S. 1 (1980), he claims that the state's sovereign immunity bars the grant of retroactive relief to the class members who did not exhaust their administrative remedies in challenging the Commissioner's conduct. In *Thiboutot* the Law Court stated that the sovereign immunity of the State of Maine precluded an award of retroactive AFDC benefits to class members. The court relied in part on the Eleventh Amendment-based prohibition developed in *Edelman v. Jordan*, 415 U.S. 651 (1974), against the recovery in federal district court of retrospective welfare benefits erroneously denied by state officials before the entry of the federal court's order determining the wrongfulness of their action. *Thiboutot*, 405 A.2d at 236. The court noted that ``a theme running pervasively through the federal decisions is that unless a state has consented to being sued for retrospective welfare benefits mistakenly withheld, it should be immune to section 1983 actions for their recovery." *Id.* at 237. The court found that neither the state statutes nor regulations concerning the administration of AFDC benefits indicated a waiver of the state's sovereign immunity.

Because this case was removed by the Commissioner to this court, the issues presented here are similar but not identical to those in *Thiboutot*. In this case the issue is whether the state's Eleventh Amendment immunity precludes the grant of retroactive relief to class members and, if so, whether the State has waived its Eleventh Amendment rights. Clearly, had the claim for retroactive relief by class members originated in this court it would be barred by *Edelman* and its progeny, absent a waiver. I must determine whether, by removing the action to this court, the state has waived its Eleventh Amendment immunity.

The Supreme Court has stated that a state's consent to be sued in federal court for retroactive benefits must be unequivocally expressed. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984); *Edelman v. Jordan*, 415 U.S. at 673. The state may indicate its intent to waive Eleventh

Amendment protection by removing the action from state court to the federal court, thereby invoking the jurisdiction of the federal court. *See Maine Ass'n of Interdependent Neighborhoods v. Petit* (hereinafter cited as ``*MAIN*''), 659 F. Supp. 1309 (D. Me. 1987) (Maine legislature waived Commissioner's common law sovereign immunity to plaintiff's state court claims for judicial review of plaintiff's medicaid application pursuant to 5 M.R.S.A. ' 11001(1) and, by removing case to federal court, state waived Eleventh Amendment sovereign immunity as well).[3] In *MAIN* this court's discussion focused on whether the state officer who removed the action had the power to waive the state's Eleventh Amendment immunity. It concluded that the Attorney General, representing the Commissioner, had the power to waive Maine's Eleventh Amendment immunity based on the following considerations:

> First, the Attorney General, by removing the case, has represented that he has the power to waive Maine's eleventh amendment immunity. Second, the Attorney General has broad power to direct state litigation in all fora. Third, the Attorney General may, ``in the absence of some express legislative restriction to the contrary exercise all such power and authority as public interest may, from time to time require,

[3] I note that in *MAIN* the court was concerned with a different statute than the one before the Law Court in *Thiboutot* in finding that the state had waived its common law sovereign immunity. Thus, this is not a case where the same statutory language is examined to determine the existence of a waiver of sovereign immunity as was examined by the state supreme court, *see Long v. Richardson*, 525 F.2d 74, 79 (6th Cir. 1975) (state supreme court's state statutory interpretation which found no waiver of sovereign immunity is highly persuasive in determining whether same statutory language constitutes waiver of Eleventh Amendment immunity), or one in which the state supreme court has interpreted a state statute as reflecting the state's intention to waive its constitutional immunity from federal suit, *see Della Grotta v. Rhode Island*, 781 F.2d 343, 347 (1st Cir. 1986) (``Where the highest court of a state has construed a state statute as intending to waive the state's immunity to suit in federal court, the state's intent is just as clear as if the waiver were made explicit in the state statute."). In any event, where the state's conduct in the case at bar shows a clear intent to invoke federal jurisdiction, the court may find a waiver of the state's Eleventh Amendment immunity without an inquiry into the state's legislative intent to waive its common law or Eleventh Amendment immunity. *See Newfield House, Inc. v. Massachusetts Dep't of Public Welfare*, 651 F.2d 32, 36 n.3 (1st Cir.), *cert. denied*, 454 U.S. 1114 (1981) (court, without analyzing any state legislative intent to waive its common law or Eleventh Amendment sovereign immunity, found a clear case of waiver where state removed action to federal court and there pressed a counterclaim).

> and may institute, conduct and maintain all such actions and proceedings as he deems necessary . . . ." *Lund ex rel. Wilbur v. Pratt*, 308 A.2d 554, 558 (Me. 1973).

Id. at 1316 (other citations omitted). The court noted that its conclusion regarding waiver of Eleventh Amendment immunity was strengthened by the fact that the Commissioner, after removal, filed a third-party complaint against the Secretary and that the state legislature waived the State's common law sovereign immunity. *See also Newfield House, Inc. v. Massachusetts Dep't of Public Welfare*, 651 F.2d 32, 36 n.3 (1st Cir.), *cert. denied*, 454 U.S. 1114 (1981) (state waived its right to claim that relief granted by trial court was barred by Eleventh Amendment where it removed case to federal court and pressed a counterclaim after removal, which actions present far clearer case of waiver than does a mere appearance).

I find that the analysis in *MAIN* is fully applicable to this case in which the Attorney General, representing the Commissioner, removed the case to this court and filed a third-party complaint against the Secretary. I thus conclude that, by removing the case and subsequently filing a third-party complaint, the Commissioner manifested the state's consent to suit in federal court for retroactive relief and has thereby waived its immunity under the Eleventh Amendment. Accordingly, I recommend that the retroactive relief sought by the plaintiff on her own behalf and on behalf of the certified class be ***GRANTED***.[4]

NOTICE

[4] Should the court find that waiver has not occurred and that, therefore, the Eleventh Amendment bars retroactive relief to the class members, the notice relief requested by the plaintiff is nevertheless entirely appropriate. *See Quern v. Jordan*, 440 U.S. 332, 349 (1979) (Eleventh Amendment does not bar federal district court from ordering state officials who wrongly denied welfare benefits to send explanatory notice to members of plaintiff class advising them that there are state administrative procedures available by which they may receive determination whether they are entitled to past welfare benefits).

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 22nd day of May, 1990.

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David M. Cohen
United States Magistrate